

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

ISRAEL ORNELAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Civil No.: 17cv02410 JAH

Criminal No.: 13cr03313-3 JAH

**ORDER DENYING MOTION TO  
VACATE**

Petitioner Israel Ornelas, proceeding *pro se*, filed a motion challenging his sentence under 28 U.S.C. section 2255. Respondent filed a response. After a thorough review of the record and the parties' submissions, and for the reasons set forth below, this Court DENIES Petitioner's motion.

**BACKGROUND**

On November 5, 2013, Petitioner was charged with knowingly and intentionally conspiring to distribute 5 grams and more of methamphetamine in violation of Title 21 United States Code sections 841(a)(1) and 846 (count 3); and knowingly and intentionally distributing 5 grams and more of methamphetamine in violation of Title 21 United States Code section 841(a)(1) and Title 18 United States Code section 2 (count 4). Indictment (Doc. No. 1). On August 21, 2014, Petitioner pled guilty to count 4 of the indictment pursuant to a plea agreement. *See* Doc. Nos. 150, 151. In the plea agreement, the

1 parties agreed to a base offense level of 28, -2 levels for safety valve, and -3 levels for  
 2 acceptance of responsibility. Plea Agreement at 8 (Doc. No. 151). The parties agreed the  
 3 government would recommend a sentence within the advisory guideline range as calculated  
 4 by the government. *Id.* at 9.

5 On October 7, 2014, Petitioner was arrested by the Drug Enforcement Agency  
 6 (“DEA”) when agents executing a search warrant discovered Petitioner in possession of  
 7 methamphetamine at his home. *See* Doc. No. 169. On October 17, 2014, the Honorable  
 8 David H. Bartick, United States Magistrate Judge, issued a warrant for Petitioner’s arrest  
 9 for a pretrial violation based upon his arrest by the DEA. *See* Doc. No. 170. Petitioner  
 10 failed to appear at the status hearing regarding his initial appearance on the violation. *See*  
 11 Doc. No. 171. On November 14, 2014, the government moved to forfeit Petitioner’s bond.  
 12 This Court sentenced Petitioner to 120 months imprisonment followed by eight years of  
 13 supervised release and granted the government’s motion to forfeit the bond. Judgment  
 14 (Doc. No. 186). Petitioner failed to appear at the sentencing hearing. *See* Doc. No. 185.

15 Petitioner, through counsel, filed a notice of appeal. *See* Doc. No. 180. On the  
 16 government’s motion, the Court granted Judgment on Default against Petitioner in the  
 17 amount of \$25,000 and against the surety in the amount of \$5,000. *See* Doc. No. 225.  
 18 Petitioner was arrested on March 11, 2015. *See* Doc. No. 222. On July 25, 2016, the Ninth  
 19 Circuit Court of Appeals issued a mandate dismissing the appeal. *See* Doc. No. 259.  
 20 Thereafter, Petitioner filed the instant motion seeking to vacate or modify his sentence.

## 21 **LEGAL STANDARD**

22 A section 2255 motion may be brought to vacate, set aside or correct a federal  
 23 sentence on the following grounds: (1) the sentence “was imposed in violation of the  
 24 Constitution or laws of the United States,” (2) “the court was without jurisdiction to impose  
 25 such sentence,” (3) “the sentence was in excess of the maximum authorized by law,” or (4)  
 26 the sentence is “otherwise subject to collateral attack.” 28 U.S.C. § 2255(a).

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## DISCUSSION

Petitioner moves to vacate or modify his sentence asserting he was denied effective assistance of counsel and court errors.

### **I. Ineffective Assistance of Counsel**

Petitioner argues defense counsel's failure to suggest circumstances that raise plausible doubt that Petitioner's absence at the sentencing hearing was voluntary caused the district court to fail to meet critical requirements and violated Rule 32. Petitioner maintains the record demonstrates he was absent from sentencing because of his ADHD, severe depression, mental health issues and heavy use of methamphetamine. He contends Counsel's failure to bring this information to the Court is ineffective representation, violated his constitutional rights under the confrontation clause, due process clause under the Fifth and Fourteenth Amendments, and his privilege to be present at his sentencing. He further contends counsel's conduct caused the Court's failure to explore the record for any serious questions about whether Petitioner's absence was knowing and voluntary and violated Rule 32's requirement to verify that Petitioner and his counsel read and discussed the presentence report.

Additionally, Petitioner argues counsel was lost and unable to effectively represent him during sentencing. He maintains counsel did not prepare or file a sentencing memorandum prior to the sentencing hearing, did not address a letter from Petitioner's co-defendant and admitted he could not effectively represent Petitioner at the hearing. Thus, Petitioner argues, the government's contentions were unchallenged at the hearing.

Petitioner further argues a conflict of interest with his attorney, caused by Petitioner's inability to pay the agreed upon fee, adversely affected counsel's performance. He maintains his attorney was focused on the remaining balance due and communication with his attorney completely broke down.

Respondent argues defense counsel was not ineffective for failing to speculate about the reason for Petitioner's absence. Respondent maintains nothing suggests defense counsel knew Petitioner absconded due to use methamphetamine and nothing in

1 Petitioner's affidavit indicates that between October 8, 2014, the date of Petitioner's last  
2 contact with the Pretrial Services Officer, and March 11, 2015, the date of Petitioner's  
3 arrest on the Court's warrant, defense counsel nor anyone else knew where Petitioner was  
4 or what he was doing. Respondent contends Petitioner's proposal that defense counsel  
5 should have speculated that Petitioner was absent due to a prolonged drug binge would  
6 have been reckless because it would have confirmed the recidivist concerns the government  
7 already raised and would have undermined arguments in favor of Petitioner's  
8 rehabilitation. By objecting to the *in absentia* sentencing and seeking a continuance,  
9 Respondent argues, defense counsel did all he could and, in acknowledging defense  
10 counsel's objections during the hearing, the Court already found no ineffectiveness.

11 Furthermore, the government maintains drug addiction does not render an act  
12 involuntary, as a matter of law. Therefore, any argument that Petitioner's heavy use of  
13 methamphetamine caused his absence to be involuntary would be futile.

14 Even if the Court concluded Petitioner's months-long methamphetamine binge was  
15 involuntary, Respondent argues the petition still fails because the mandatory-minimum  
16 sentence Petitioner received was the only possible result. The best Petitioner could have  
17 hoped for, according to Respondent, is to delay sentencing.

18 Respondent also argues Petitioner waived the right to be present at sentencing, when  
19 he absconded, and all the rights that follow from that right and there was nothing his  
20 attorney could do to fix the damage caused by Petitioner forfeiting his rights. Respondent  
21 maintains defense counsel gathered letters of support and other documents related to the  
22 sentencing hearing in advance of the hearing, but he could not know, in good faith, what  
23 representations to make to the Court on Petitioner's behalf because he was unable to  
24 contact him. In addition, the letter Petitioner asserts is from his co-defendant was  
25 determined to be a forgery. Respondent argues defense counsel's strategy to seek to  
26 continue the hearing was reasonable.

27 Respondent also argues a dispute over legal fees does not constitute ineffective  
28 assistance of counsel and defense counsel declared, under penalty of perjury, that

1 notwithstanding Petitioner's failure to pay his fee, he "represented [Petitioner] with the  
2 same competence as all [his] other clients in [his] approximately 45 years of practicing  
3 criminal law in this district." Gellar Decl. ¶ 12.

4 In reply, Petitioner maintains his counsel's declaration demonstrates he was a heavy  
5 user of methamphetamine and attending mental health classes and argues this supports that  
6 he was incapable of exercising his own free will to waive his right to be present at his  
7 hearing. He argues his absence from his sentencing due to his methamphetamine use is  
8 not the same as someone committing a crime due to an addiction to methamphetamine. He  
9 maintains the Ninth Circuit addressed defense counsel's failure to suggest circumstances  
10 that raise a plausible doubt that his absence was voluntary and he contends counsel was  
11 required to suggest circumstances of which he had knowledge that raise a plausible doubt  
12 of Petitioner's absence being voluntary. Petitioner also suggests that the prejudice  
13 potentially caused by counsel's speculation about his absence would not be any more  
14 prejudicial than the sentence he received. He also disputes that the letter from his co-  
15 defendant that he provided his attorney was forged.

16 The Sixth Amendment to the Constitution provides that every criminal defendant  
17 has the right to effective assistance of counsel. To sustain a claim of ineffective assistance,  
18 a petitioner has the burden of showing (1) that his or her defense counsel's performance  
19 was deficient, and (2) that the deficient performance prejudiced his or her defense.  
20 *Strickland v. Washington*, 466 U.S. 668 (1984). at 690-92; *Hendricks v. Calderon*, 70 F.3d  
21 1032, 1036 (9th Cir. 1995). Petitioner must prove both elements. The court may reject his  
22 claim upon finding either that counsel's performance was reasonable or that the claimed  
23 error was not prejudicial. *Strickland*, 466 U.S. at 697. The *Strickland* test applies to federal  
24 collateral proceedings. *Id.* at 697. Furthermore, the Ninth Circuit has applied the  
25 *Strickland* standard to claims of ineffective assistance of counsel during plea negotiations.  
26 *Washington v. Lampert*, 422 F.3d 864, 871-72 (9th Cir. 2005).

27 To satisfy the deficient performance prong of the *Strickland* test, a petitioner must  
28 show that his counsel's conduct was not "within the range of competence demanded of

1 attorneys in criminal cases.” *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). There is a “strong  
2 presumption that counsel’s conduct falls within a wide range of acceptable professional  
3 assistance.” *Strickland*, 466 U.S. at 689. The performance inquiry “must be whether  
4 counsel’s assistance was reasonable considering all the circumstances.” *Id.* at 688.

5 Petitioner contends his counsel was deficient in failing to inform the Court of  
6 circumstances that raise plausible doubt that his absence from the sentencing hearing was  
7 not voluntary although counsel knew he suffers from ADHD and mental health issues and  
8 has an addiction to methamphetamine. Under Federal Rule of Criminal Procedure 43, a  
9 defendant waives his right to be present at his sentencing hearing when he or she is  
10 voluntarily absent. FED.R.CRIM.P. 43(c)(1)(B). While counsel was aware of Petitioner’s  
11 addiction and mental health issues, Petitioner presents no evidence that defense counsel  
12 knew his absence was a result of his drug use or mental health issues. Petitioner’s own  
13 declaration demonstrates he had no contact with his attorney since before his arrest by DEA  
14 agents. Furthermore, the information regarding Petitioner’s drug use and mental health  
15 issues was part of the record of the case and included in sentencing documents submitted  
16 to the Court in advance of the hearing. Petitioner’s suggestion that defense counsel should  
17 have speculated that Petitioner’s absence was the result of his methamphetamine addiction  
18 and shared this with the Court, without having an opportunity to confer with Petitioner,  
19 could have been detrimental.

20 Additionally, defense counsel explained he did not file sentencing documents  
21 because Petitioner’s absence prevented him from conferring with Petitioner and he did not  
22 want to be ineffective. Counsel moved to continue the sentencing hearing based upon his  
23 inability to review the presentence report with Petitioner and effectively represent  
24 Petitioner at the hearing. Reporter’s Transcript (“RT”) 2:19-3:25 (Doc. No. 241). There  
25 is no indication counsel failed to set forth any argument at sentencing because of a dispute  
26 over his fee. The Court found it appropriate to sentence Petitioner *in absentia* based upon  
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1 the record of the case<sup>1</sup>, preserved defense counsel's objection and determined there was no  
 2 ineffectiveness. *Id.* 3:18-25; 7:15-20.

3 The Court finds defense counsel's request to continue the hearing and failure to  
 4 speculate as to why Petitioner was absent was reasonable under the circumstances.  
 5 Accordingly, Petitioner fails to demonstrate his attorney's performance was deficient and  
 6 his motion based upon ineffective assistance of counsel is DENIED.

## 7 **II. Court Errors**

8 Petitioner contends the district court failed under Rule 43(c)(1)(B) to indulge every  
 9 reasonable inference against a finding of voluntary absence even though the record  
 10 demonstrated Petitioner's mental health issues and drug addiction and failed to explore any  
 11 serious question raised about whether Petitioner's absence was knowing and voluntary on  
 12 the record. This claim was raised on direct appeal and rejected and, therefore, is not subject  
 13 to review in a section 2255 motion. *United States v. Redd*, 759 F.2d 699, 701 (9th Cir.  
 14 1985).

## 15 **III. Hearing**

16 Petitioner seeks a hearing. This Court finds the record conclusively establishes  
 17 Petitioner is not entitled to relief. Accordingly, there is no basis for an evidentiary hearing.  
 18 *See* 28 U.S.C. § 2255(b).

## 19 **CERTIFICATE OF APPEALABILITY**

20 Pursuant to Rule 11 of the Rules following 28 U.S.C. section 2254, a district court  
 21 "must issue or deny a certificate of appealability when it enters a final order adverse to the  
 22 applicant" in Section 2255 cases such as this. A habeas petitioner may not appeal the denial  
 23 of a Section 2255 habeas petition unless he obtains a certificate of appealability from a  
 24 district or circuit judge. 28 U.S.C. § 2253(c)(1)(B); *see also United States v. Asrar*, 116  
 25 F.3d 1268, 1269-70 (9th Cir. 1997) (holding that district courts retain authority to issue  
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 28 <sup>1</sup> The Court noted further evidence of Petitioner's intent to abscond and not appear in the sealed record  
 the Court reviewed during the hearing. RT 7:15-20.



certificates of appealability under AEDPA). A certificate of appealability is authorized “if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To meet this threshold showing, a petitioner must show that: (1) the issues are debatable among jurists of reason, (2) that a court could resolve the issues in a different manner, or (3) that the questions are adequate to deserve encouragement to proceed further. *Lambright v. Stewart*, 220 F.3d 1022, 1025-26 (9th Cir. 2000) (citing *Slack v. McDaniel*, 529 U.S. 473 (2000)).

Based on this Court’s review of the record, this Court finds no issues are debatable among jurists of reason and no issues could be resolved in a different manner. This Court further finds that no questions are adequate to deserve encouragement to proceed further. Therefore, Petitioner is not entitled to a certificate of appealability.

### CONCLUSION AND ORDER

Based on the foregoing, IT IS HEREBY ORDERED:

1. Petitioner’s motion to vacate, set aside or correct his sentence (Doc. No. 263) is **DENIED**;
2. Petitioner’s motion to appoint counsel (Doc. No. 265) is **DENIED**;
3. Petitioner’s motion to expedite (Doc. No. 278) is **DENIED as moot**;
4. Petitioner’s motion to extend time (Doc. No. 304) and motion for leave to file excess pages (Doc. No. 305) are **GRANTED**.
5. Petitioner is **DENIED** a certificate of appealability.

DATED: September 27, 2021

  
 JOHN A. HOUSTON  
 United States District Judge